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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 951

KOA GORA, *Petitioner,*

vs.

TERRITORY OF HAWAII, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Koa Gora, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the final judgment of said court, entered January 4, 1946, affirming the judgment of the Supreme Court of the Territory of Hawaii.

OPINIONS BELOW.

The opinion of the Supreme Court of the Territory of Hawaii is contained in the record. (R. 30-38.) The opinion of the Circuit Court of Appeals in affirming the judgment is also contained in the record. (R. 60-66.) No opinion was rendered by the Circuit Court of Appeals in denying a petition for rehearing on February 1, 1946. (R. 67.)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner was convicted in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii of violating section 6253 of the Revised Laws of Hawaii, 1935. (R. 53.) The section, as amended by the Session Laws of Hawaii, 1941, pp. 249-260, provided:

> "Any man or woman who is guilty of lewd conversation, lascivious conduct, or libidinous solicitations, shall be punished by imprisonment of not more than one year or by a fine not exceeding one thousand dollars ($1000.00), or by both such imprisonment and fine."

The accusation against petitioner was in this language:

> "That Koa Gora, at Honolulu, City and County of Honolulu, Territory of Hawaii, on the 6th day of July, A.D. 1943, did do that which was lewd and lascivious in conduct, contrary to section 6253 of the Revised Laws of Hawaii, 1935." (R. 32, 52, 61.)

Petitioner did not demand a bill of particulars. On conviction, he was sentenced to imprisonment for six months. (R. 40-43.) His writ of error to the Supreme Court of the Territory of Hawaii challenged the cryptic accusation as repugnant to the Fifth and Sixth Amendments to the Constitution of the United States. (R. 31-32.) The court ruled against him. (R. 38.) Petitioner repeated the challenge (R. 3-5) on appeal to the Circuit Court of Appeals for the Ninth Circuit in accordance with section 128 of the Judicial Code. (28 U.S.C.A., sec. 225.) Again the court ruled against him. (R. 62-64.) That court also ruled that petitioner had waived the right of challenge by his failure to demand a bill of particulars. (R. 63.)

JURISDICTION.

Jurisdiction of this court is invoked under section 240 (a) of the Judicial Code. (28 U.S.C.A., sec. 347.)

QUESTIONS PRESENTED.

1. Was the accusation against petitioner repugnant to the Fifth and Sixth Amendments to the Constitution of the United States?

2. Did petitioner waive the right to challenge the accusation by failing to demand a bill of particulars?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court and with its own decisions on an important question of constitutional law.

The accusation against petitioner was that on a specified day at a specified city he *"did do that which was lewd and lascivious in conduct"*. This was the equivalent of an accusation that on a specified day at a specified city he committed "the form of immorality which has relation to sexual impurity". (*Swearingen v. United States,* 161 U.S. 446, 16 S.Ct. 562, 563.) Does an accusation of such character satisfy the mandate of the Fifth Amendment to the Constitution that "no person shall * * * be deprived of * * * liberty * * * without due process of law", and the mandate of the Sixth Amendment to the Constitution that "in all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation"?

The application of those amendments to civil and criminal cases in the Territory of Hawaii, may not be doubted.

Farrington v. T. Tokushige, 273 U.S. 284, 299, 47 S.Ct. 406, 409, 71 L.Ed. 646.

Lovato v. New Mexico, 242 U.S. 199, 37 S. Ct. 107, 108, 61 L.Ed. 244.

Callan v. Wilson, 127 U.S. 556, 8 S.Ct. 1301, 32 L.Ed. 223.

Repeatedly, this court has said that the constitutional mandates of the said amendments are not satis-

fied unless an accusation is direct, positive, certain, and particular.

Evans v. United States, 153 U.S. 584, 14 S.Ct. 934, 936, 38 L.Ed. 839.

United States v. Cruikshank, 92 U.S. 542, 557-8, 23 L.Ed. 588, 593.

Repeatedly, this court has also said that the constitutional mandates of the said amendments are not satisfied unless an accused is so informed of the nature and cause of the accusation that he may meet it and prepare for trial, and after judgment be able to plead the record and judgment in bar of a further prosecution for the same offense.

Wong Tai v. United States, 273 U.S. 77, 80-1, 37 S.Ct. 300, 71 L.Ed. 549.

And repeatedly, this court has further said that the constitutional mandates of the said amendments are not satisfied unless the accusation is in due form under a certain and unambiguous law defining the crime.

Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888.

United States v. L. Cohen Grocery Co., 255 U. S. 81, 89-92, 41 S.Ct. 298, 300-1, 65 L.Ed. 516.

In accord with the authorities last cited is the decision of the Circuit Court of Appeals for the Ninth Circuit in *Simmons v. United States,* 119 F. (2d) 539, 544.

That the accusation against petitioner did not satisfy the said constitutional mandates, is obvious.

The accusation was not direct, or positive, or certain, or particular. It did not inform him of the nature and cause of the accusation, for it did not inform him of specific accusers, specific accusatory circumstances, or a specific offense coming within the general definition of "lascivious" conduct, or immoral conduct having relation to sexual impurity. At best, the form of accusation made could only prompt speculation in the mind of an accused as to what conduct on his part during each and every moment of the day specified might, in the opinion of his accusers, whoever they were, be regarded as "lascivious". At best, the form of accusation would force any accused to trial not knowing who his accusers were, not knowing what specific accusations were made, and not knowing what defense to prepare.

Moreover, an accusation thus framed is intolerable to the doctrine of double jeopardy. If, after having once been acquitted or convicted on an accusation thus framed, an accused is again faced with an accusation in the same language, he cannot determine whether he is being prosecuted for the same offense. He must proceed to trial in darkness, and if enlightenment comes at all it must come only after such trial is completed.

Again, the Hawiian statute under review is not a certain and unambiguous law defining the crime of "lascivious conduct". That phrase fixes no immutable standard of guilt. The standard is left to the variant views of different courts and juries. All must speculate as to the meaning of the phrase. What may

be considered as immorality relating to sexual impurity in one case may not be so considered in the next. In each case the standard is locked up until the trier of facts applies the key. The repugnancy of the phrase to the constitutional mandates discussed, is obvious.

(2) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court and with its own decisions on an important question of criminal law.

By the decision in the present case the Circuit Court of Appeals for the Ninth Circuit determined that petitioner had waived his right to challenge the accusation by failing to demand a bill of particulars. This was plain error, for if an accusation be repugnant to the due process of law clauses, "specification of details of the offense would not serve to validate it".

Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888.

In *Foster v. United States,* 253 F. 481, the Circuit Court of Appeals for the Ninth Circuit said, at page 483:

> "The bill of particulars could not avail to cure the defect of the indictment."

And in *Collins v. United States,* 253 F. 609, the same court said, at page 610:

> "It should be premised that a bill of particulars can in no way aid or render sufficient an indictment fundamentally bad. * * * The bill of particulars, therefore, filed by the prosecuting attorney, can in no way aid the sufficiency of the indictment."

CONCLUSION.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final judgment of said court in said cause be reviewed and reversed.

Dated, San Francisco, California,
March 11, 1946.

FRED PATTERSON,
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Of Counsel.

FILED
MAY 29 1946
CLERK

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KOA GORA,
Petitioner,

vs.

TERRITORY OF HAWAII,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI

OPINIONS OF COURTS BELOW

The opinion of the Supreme Court of the Territory of Hawaii will appear in Volume 37 Hawaii Reports at pages 1-7. This volume has not yet been printed and the opinion therefore now appears only in the advanced sheets. In the record, the opinion appears at pages 30-38.

The opinion of the Circuit Court of Appeals for the Ninth Circuit, affirming the decision of the

Supreme Court of the Territory of Hawaii is reported in Volume 152 Federal (2nd) (Advanced Opinions—No. 6) at pages 933-936. The opinion appears in the record at pages 60-66.

JURISDICTION

The Circuit Court of Appeals affirmed the judgment of conviction on January 4, 1946 (R. 66). Petitioner filed a petition for rehearing in the Circuit Court of Appeals on February 1, 1946 (R. 67). The petition for rehearing was denied by the Circuit Court of Appeals on February 11, 1946 (R. 67).

The petition for a writ of certiorari was filed on March 14, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, (28 U.S.C.A. Sec. 347).

STATEMENT

The following additional statement is intended to aid in an understanding of the facts:

Petitioner operated a rooming house on Kamamalu Street in Honolulu (R. 10). The Navy Shore Patrol and the Vice Division of the Honolulu Police Department had received complaints regarding the "sex character" of petitioner (R. 13 and 16). Arthur A. Notikai, a member of the United States Shore Patrol and Sergeant Frank Shaner of the Vice Division of

the Honolulu Police Department were assigned to investigate petitioner's establishment.

The Shore Patrol had a list of "bona fide" rooming houses and hotels where sailors could stay overnight. The petitioner's place was not on this list (R. 13).

At 10:30 A.M. on July 6, 1943, Notikai went to petitioner's place allegedly looking for a room. Notikai was taken to a room having a shower. Petitioner undressed and entered the shower. He solicited Notikai to come in the shower and look at him (R. 11). Thereafter petitioner came out of the shower, unbuttoned Notikai's trousers, and laid hands on Notikai's private parts (R. 11).

The petitioner was initially tried in the District Court of Honolulu and found guilty of lewd and lascivious conduct (R. 49-52).

The lower courts also found petitioner guilty of selling Notikai a pint of liquor in violation of Section 2630, Revised Laws of Hawaii 1935, but no appeal was taken from that conviction (R. 6).

Thereafter petitioner appealed to the First Circuit Court of the Territory of Hawaii, and after a trial de novo, was again found guilty (R. 6 and 48).

An appeal was thence taken to the Supreme Court of the Territory of Hawaii. That court affirmed the

judgment of conviction in its decision filed September 14, 1944 (R. 38). Thereafter an appeal was perfected to the United States Circuit Court of Appeals for the Ninth Circuit. On January 4, 1946 the Circuit Court filed its opinion again affirming the judgment of conviction.

A petition for rehearing was filed on February 1, 1946 (R. 67). The order denying the rehearing was entered February 11, 1946 (R. 67). Petitioner now asks for certiorari.

QUESTIONS PRESENTED

The questions raised by petitioner are:

1. The validity of the purported accusation against him, and
2. The validity of the statute upon which the accusation is founded.

ARGUMENT

The petitioner attacks both the charge and the statute under which he has been convicted.

As to the charge against him the petitioner argues that a charge must be "direct, positive, certain, and particular" in order to enable the accused to be "informed of the nature and cause of the accusation that he may meet it and prepare for trial" and thereafter "plead the record and judgment in bar of a

further prosecution for the same offense" (Pet. Br., p. 5).

The petitioner had two trials in the courts below upon the issue of his guilt of the misdemeanors of which he was convicted. During those two trials, first in the District Court of Honolulu and thereafter in the First Circuit Court of Hawaii, the sufficiency of the charge against petitioner was not questioned or even mentioned.

The sufficiency of the charge was attacked for the first time upon appeal in the Supreme Court of the Territory of Hawaii (R. 38).

When a defendant has been accorded a fair trial and the charge is attacked upon appeal for the first time, as an afterthought, the rule to be applied is stated in 24 C.J.S., title Criminal Law, 275, Section 1671, as follows:

> "An indictment questioned for the first time on appeal, however, must be held sufficient, unless so defective that by no construction can it be said to charge the offense for which accused was convicted."

As stated by the Court in *Tong Kai v. Territory*, 15 Hawaii Reports 612 at 613:

> "None of these objections were raised until after verdict and must be deemed to have been waived."

Said the Court in *Coates v. United States,* (C.C.A. 9th) 59 Fed. (2nd) 173 at 174:

> "After verdict, every intendment must be indulged in support of the indictment."

In 42 C.J.S., title Indictments and Informations, 1344, Section 312, the rule is stated as follows:

> "*Construction of pleading after verdict.* Objections to the sufficiency of an indictment or information made after trial and verdict do not receive the same favorable consideration as similar objections made before arraignment and plea. After verdict every presumption and inference is in favor of the verdict, and, although the rules requiring that accused must be apprised of the charge against him cannot be relaxed altogether, a reasonable degree of latitude is allowed in the construction of the pleadings of the prosecution. Hence, an indictment is construed most strongly in favor of the state, and against accused; every intendment must be indulged in its support, and no objection can prevail if no prejudice appears."

The Supreme Court of the Territory of Hawaii thus stated, in pointing out the lack of merit in petitioner's contention (R. 38):

> "Further, assuming arguendo that the defendant was entitled to more particularity, that right is deemed to have been waived and therefore he cannot be heard, after plea and conviction upon substantial evidence of guilt, to assert it for the first time on appeal, the record conclusively showing that the defendant not only took no advantage of any statutory procedure provided for his benefit

but also proceeded through the entire period of trial without objecting to the charges in the lower court or calling their alleged insufficiencies in any way to the attention of the trial judge or prosecuting attorney."

THE CHARGE NEED NOT SET FORTH THE EVIDENCE OR ACTS CONSTITUTING THE LASCIVIOUSNESS.

Petitioner does not specify what particular information he deems to be missing from the purported charge. The argument advanced in the petition for certiorari is confined to generalities. Petitioner says that the accusation did not inform him of the "specific accusatory circumstances." Presumably, petitioner means that the charge did not give the "details" of the lascivious conduct.

However, even though this defendant may have wished to have the details of the lascivious acts set forth in the charge—which is doubtful—nevertheless the courts refuse to allow their records to be polluted by giving the details of lasciviousness.

As stated in *People v. Carey*, (Mich.) 187 N.W. 261 at 262, quoting *People v. Girardin*, 1 Mich. 90:

> "Courts never allow its records to be polluted by bawdy and obscene matters."

Thus, in this type of case the charge, properly, should not set forth the details of the lasciviousness.

As stated in 27 American Jurisprudence, title Indictments and Informations, 664, Section 103:

> "But there are cases to which the rules just stated do not apply. Thus, in some courts an indictment or information charging the accused with an offense of a vile and degrading nature, particularization of the details of which would be offensive to decency, may be charged in the general words of the statute, even though they may not be sufficiently specific to inform him of the exact act or acts which constitute the offense."

Moreover, the charge never need set forth the evidence upon which the government intends to rely. As stated in *Territory v. Yoshimura,* 35 Hawaii Reports 324 at 332:

> "The right of an accused to be fully informed of the nature of the charge against him relates, so far as the information is concerned, solely to the charge and not the evidence in support thereof . . .
>
> "The state is not required to plead the evidence relied upon to prove the acts alleged to have been committed by the defendant . . ."

The purported charge in the case at bar employed the words of the statute. This was sufficient. It was wholly unnecessary to set forth the lascivious acts committed by the petitioner.

As stated in *People v. Carey,* supra, (187 N.W. 261 at 262:

". . . The information in the language of the statute informed defendant of the crime for which he was to be tried. It should not state the evidence by which it is to be proved, nor should it describe the particular act charged. The gross indecency of the subject forbids it."

As further stated by the court in the Carey case (187 N.W. at 262):

"The information followed the language of the statute (section 15511, Comp. Laws 1915):

'That any male person who in public or private commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be deemed guilty of a felony and upon conviction thereof be punished, etc.

—but it did not give the particulars of any act of gross indecency, and the term is not defined by the statute." (Emphasis ours.)

In the Carey case, the defendant throughout the trial by timely objection—contrary to the petitioner in this case— sought his discharge on the ground that he was not charged with any offense known to the law.

In overruling that contention, the court held the "gross indecency" of the subject forbids the "statute" as well as the "information" from setting forth any description of the lascivious act charged. The information in the language of the statute was held sufficient

regardless of the fact that the statute did not define the term or give any particulars of the offense.

Thus in the case of *State v. Burgess,* (Maine) 123 A. 178, the defendant was charged as follows:

> " 'Ernest Burgess, of said Oakland, in said county, on the 2d day of August, 1923, at said Oakland, was a person wanton and lascivious in speech and behavior, against the peace of the state and contrary to the statute in such case made and provided.' "

To this charge the defendant, at the very outset of the case and in due time—which differentiates it from the case at bar, where in spite of two trials no objection was ever made—demurred to the charge upon the ground that it was not sufficient since the words and acts which constituted the alleged wantonness and lasciviousness were not specifically set forth.

The statute under which the charge was brought merely stated (123 A. at 178) that "wanton and lascivious persons in speech, conduct or behavior" should be punished.

In overruling the defendant's contention that the acts of lasciviousness should be specifically set forth the court stated (123 A. 178):

> "Such is not the rule of pleading in this class of offenses, where it is the common practice and not the particular words or acts which constitute the crime alleged.

"It may and doubtless does become necessary to prove the doing of particular acts and the utterances of certain words of a wanton and lascivious nature in order to make out the statutory offense, but these are merely evidence of the general charge, and need not be alleged in the complaint. *Commonwealth v. Pray*, 13 Pick. (Mass.) 359. Or as well expressed in a headnote in *State v. Collins*, 48 Me. 217:

" 'When an offense consists of a series of acts, or a habit of life, the indictment may charge the offense in general terms, and the particular acts which establish the guilt of the party need not be stated.' "

Thus the court in the Burgess case held the charge in the language of the statute sufficient regardless of the fact that the statute did not attempt to define the offense.

In *People v. Kratz*, 230 Mich. 334, 203 N.W. 114, the defendant appealed from a conviction for indecent exposure claiming that the information was not sufficient to charge any offense. The defendant duly preserved exceptions throughout the trial of the case upon the theory that the information was not sufficient since it merely charged the offense in the words of the statute.

The statute in that case provided (203 N.W. 114):

" 'If any man or woman, married or unmarried, . . . shall designedly make any open and indecent

or obscene exposure of his or her person, . . . every such person shall be punished by imprisonment in the county jail,' etc."

The information in the Kratz case provided (203 N.W. 114) that the defendant did, ". . . then and there designedly make an open, indecent and obscene exposure of his person in the presence of Margaret Leversay, Lucille Leversay and Alice Jones, contrary to the form of the statute in such cases made and provided . . ."

In holding that the information was sufficient in the Kratz case the court stated:

> "As a general rule, it is held sufficient to charge the offense in the language of the statute, although in a certain class of cases it has been held not sufficient. This belongs to that class of cases of which it was said in *State v. Millard*, 18 Vt. 577, 46 Amer. Dec. 170 . . .:
>
> " 'No particular definition is given, by the statute, of what constitutes this crime. The indelicacy of the subject forbids it, and does not require of the court to state what particular conduct will constitute the offense. The common sense of the community, as well as the sense of decency, propriety and morality, which most people entertain, is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it.' " (p. 114.)

In *State v. Schumacher*, (Iowa '23) 191 N.W. 870, the indictment charged, in substance, that the

defendant committed lewd and lascivious acts upon the body of a certain child. The defendant noted exceptions and appealed claiming that the facts constituting the crime should have been set out and that the indictment merely asserted a conclusion of law.

In overruling this contention, the court stated (191 N.W. 870):

> "The indictment . . . is substantially in the language of the statute, and is sufficient . . ."

As stated in *State v. Vliet,* (N.J.) 197 A. 894 at 895, by the court in considering the sufficiency of an indictment for lewdness:

> "The indictment follows the language of the statute. This is sufficient. *Graves v. State,* 45 N.J.L. 203; *State v. Cohen,* 108 N.J.L. 216, 157 A. 437."

For the same reason—because the indecency of the subject forbids it—indictments for serious felonies such as sodomy, in the language of the statute, have been held sufficient even though the statute made no attempt to define the crime.

Said the court in *Borden v. State,* (Okla. 1927) 252 Pac. 446-447:

> "The statute gives no definition of the crime which the law with due regard to the sentiments of decent humanity has always treated as one not fit to be named."

". . . An indictment or information, charging the commission of the crime against nature, in the language of the statute is sufficient."

Thus it was stated by the court in *State v. Langelier,* (Maine) 8 A. (2nd) 897 at 897:

"It has frequently been held that it is sufficient merely to charge the accused with the commission of the crime 'sodomy,' or of 'the crime against nature,' the crime being . . . too disgusting to require other definition or further details or description. Wharton's Crim. Pro., 10th ed., V. 2, Secs. 1234 and 1243; 8 R.C.L. 335."

In *Glover v. State,* 179 Ind. 459, 101 N.E. 629 at 630, the indictment merely charged that the defendant had committed the crime of sodomy. The defendant appealed claiming a statement of the facts constituting the offense should have been given. The basis of the defendant's claim was ". . . that where an offense is defined by statute in generic terms, without naming the particular acts constituting it, . . . it is not sufficient to charge it in the language of the definition, but the particular acts must be stated which constitute the offense denounced."

In overruling the foregoing claim set up by the defendant, the court stated (101 N.E. at 630):

"But by reason of the vile and degrading nature of this crime, it has always been an exception to the strict rules requiring great particularity and

nice certainty in criminal pleading, both at common law and where crimes are wholly statutory. It has never been the usual practice to describe the particular manner or the details of the commission of the act, and, where the offense is statutory, a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required. Coke, 3 Inst. 59; 12 Coke's Rep. 37; 2 Chitty, Cr. Law, 50; Crown, Cir. Comp. 86; 4 Blackstone, 215, 216; 20 Encyc. of Pl. & Pr. 274; 36 Cyc. 503; 1 Whart. Cr. Law (11th Ed.) Sec. 760; *People v. Williams* (1881) 59 Cal. 397; *Davis v. State* (1810) 3 Har. & J. (Md.) 154; *Lambertson v. People* (1861) 5 Parker, Cr. R. (N.Y.) 200; *Com. v. Dill* (1894) 160 Mass. 536, 36 N.E. 472; *State v. Romans* (1899) 21 Wash. 284, 57 Pac. 819; *Bradford v. State* (1893) 104 Ala. 68, 16 South 107, 53 Am. St. Rep. 24; *State v. Williams* (1882) 34 La. Ann. 87; *Honselman v. People* (1897) 168 Ill. 172, 48 N.E. 304; *Kelly v. People* (1901) 192 Ill. 119, 61 N.E. 425, 85 Am. St. Rep. 323; *State v. Whitmarsh* (1910) 26 S.D. 426, 128 N.W. 580."

Thus in Hawaii, Section 11681, Revised Laws of Hawaii 1945 (set forth in the Appendix) does not attempt to give any of the particulars of, nor to define what shall constitute the crime of sodomy. Neither are the details ever set forth in an indictment.

Petitioner also objected to the purported charge for the first time, upon appeal, upon the ground that it is so vague it would force him to trial "not knowing what defense to prepare" (Pet. Br., p. 6).

The foregoing argument would have held merit if it had been made at any time during the course of the two trials in the courts below. If petitioner had actually desired additional information in order to prepare his defense he would certainly have been entitled to have both trial courts consider such a request.

But petitioner never once claimed, during the course of the two trials, as he does now upon this appeal, that he needed additional facts to prepare his defense. The proper time for petitioner to have said that he needed additional facts to prepare his defense was in the two trial courts, not after verdict, upon appeal.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN ACCORD WITH BOTH THE DECISION OF THIS COURT AND ITS OWN DECISIONS.

The petitioner argues that the holding of the Circuit Court of Appeals in the present case, was that he "had waived his right to challenge the accusation by failing to demand a bill of particulars" (Pet. Br., p. 7). Petitioner then proceeds to argue that a bill of particulars, even if asked for, cannot cure a charge, fundamentally bad (Pet. Br., p. 7). It is upon the basis of the foregoing argument that petitioner says the deci-

sion of the Circuit Court of Appeals is in conflict with its own, and the decisions of this Court.

But petitioner has misinterpreted the holding of the Circuit Court of Appeals.

The Circuit Court of Appeals did not hold the purported charge to be fundamentally bad. Nor did it say that petitioner had waived any rights to challenge a fundamentally bad charge.

The Circuit Court of Appeals noted that petitioner claimed that the accusation "failed to set forth the alleged offense with reasonable particularity as a result of which (he) . . . was prevented from adequately preparing his defense." [152 Fed. (2nd), pp. 934-935.]

The court then held that: "It is not necessary that the particular lascivious acts be set forth; the charge is sufficient if it merely follows the words of the statute."

The court further held that: "if in preparing for trial, appellant had felt that a particularization of the alleged acts was necessary for a proper defense, he could have asked for a bill of particulars."

The court then went on to say that: "Inasmuch as appellant did not at any time either before or during the course of the trial object to the sufficiency of the

information, we cannot see how the form of the charge prejudiced the preparation of his defense. It has been held many times that if the defendant fails to object to the sufficiency of the information until after the verdict it will be deemed that he was sufficiently apprised of the nature of the charge against him and the case will not be reversed in the absence of prejudice."

Thus the petitioner's argument that the decision of the Circuit Court of Appeals is in conflict with its own, and the decisions of this Court, is refuted by the Court's opinion as quoted hereinabove.

PETITIONER IS FULLY PROTECTED FROM FURTHER PROSECUTION FOR THE SAME OFFENSE.

Petitioner argues that the purported charge does not protect him from a possible further charge for the same identical offense. This contention is upon the basis that the purported charge is so vague that petitioner would not be able to ascertain whether a second charge was for the same offense (Pet. Br., p. 6).

Such argument is not tenable. The evidence upon which petitioner has been convicted is of record in this and other courts. Therefore he knows with positive certainty all the evidence and facts of his present conviction. And petitioner would have recourse not only to the charge in this case but to all the record and even the oral testimony in order to prove the

conviction. Such a record affords petitioner greater certainty and protection than the most explicit charge possibly could afford him.

Dunbar v. U.S., 156 U.S. 185, 15 S. Ct. 325, 39 L. Ed. 390 at 392

U.S. v. Remington, (C.C.A. 2nd, 1933) 64 Fed. (2nd) 386 at 388

IT IS NOT NECESSARY FOR THE STATUTE TO DEFINE THE MEANING OF THE TERM "LASCIVIOUS CONDUCT."

Petitioner also contends that the statute under which he has been convicted, (formerly Section 6253, Revised Laws of Hawaii 1935; now Section 11673, Revised Laws of Hawaii 1945; set forth in Appendix) is unconstitutional because, as he claims, the legislature did not define what was to be meant by the term "lascivious conduct." Therefore, petitioner argues, that "all must speculate as to the meaning of the phrase" (Pet. Br., p. 6).

Petitioner's attack upon the constitutionality of the statute—like his attack upon the purported charge —was also made as an afterthought for the first time upon appeal. Assuming arguendo, however, that the statute may now be questioned, nevertheless it will be seen that the petitioner's argument is wholly without merit.

The petitioner says the legislature should have defined what was meant by the term "lascivious conduct." That it is not necessary for the legislature to define the term "lascivious conduct" is well settled. In fact, statutes dealing with lasciviousness do not attempt to define the term. And the reason therefore, is stated in 8 Ruling Case Law 347, Section 380 as follows:

> "Statutes making open and gross lewdness a crime do not attempt to define what constitutes the crime, and because of the nature of the subject the courts have refrained from going beyond the immediate needs of the case in hand. The common sense of the community as well as the sense of decency, propriety and morality, which most people entertain, is sufficient to apply those statutes to each particular case and point out what particular conduct is rendered criminal by them."

Also see:

> 31 Corpus Juris, title Indictments & Informations, 718, Sec. 268, Note 33.

Thus it was not necessary for the Hawaii Statute to define the term lascivious conduct. The indecency of the subject prohibits particularization in the statute as well as in the charge. The purported charge in the present case followed the words of the statute. This was sufficient.

CONCLUSION

The unanimous decisions of the courts below are in accord with justice and the Constitution. The petition for certiorari is wholly lacking of merit and should be denied.

Dated: Honolulu, T. H., this_____day of May, A. D. 1946.

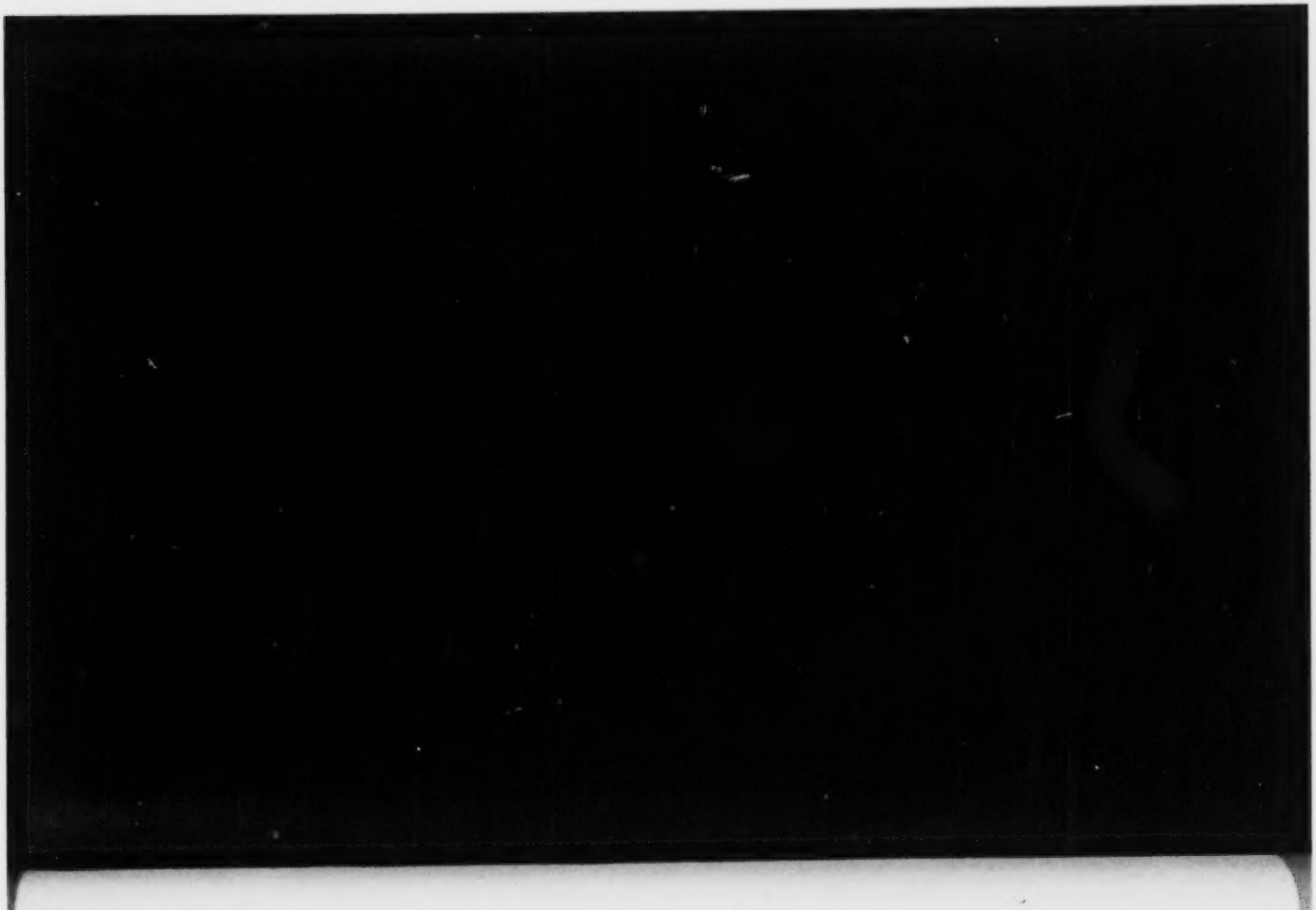
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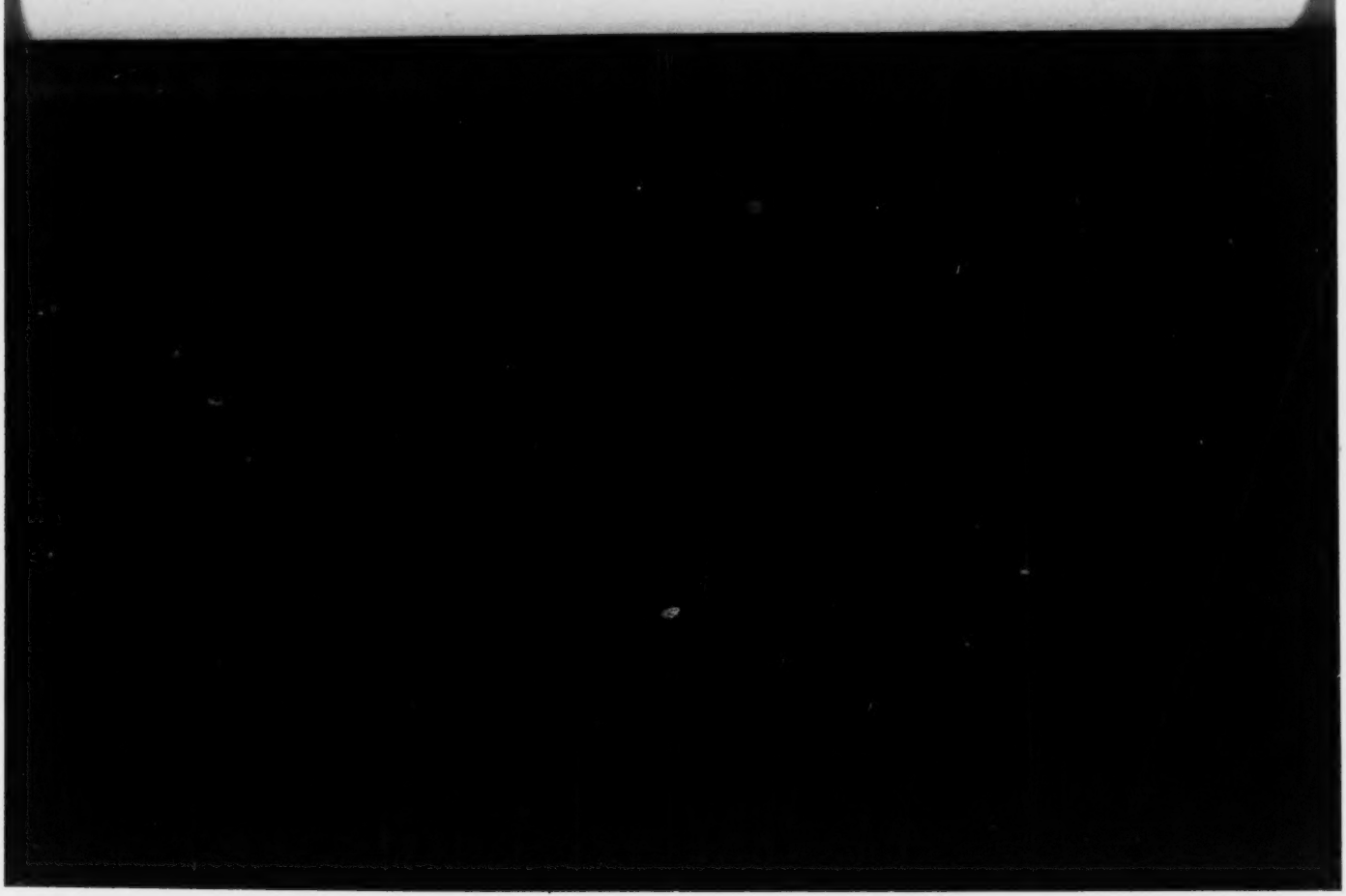
_____

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Appendix

Section 11673, Revised Laws of Hawaii 1945.

Lascivious conduct, etc.; penalty. Any man or woman who is guilty of lewd conversation, lascivious conduct, or libidinous solicitations, shall be punished by imprisonment of not more than one year or by a fine of not exceeding one thousand dollars, or by both such imprisonment and fine. (P.C. 1869, c. 13, s. 8; R.L. 1925, s. 4447; R.L. 1935, s. 6253; am. L. 1941, c. 88, s. 1.)

Section 11681, Revised Laws of Hawaii 1945.

Sodomy defined; penalty. Whoever commits sodomy, that is, the crime against nature, either with mankind or any beast, shall be punished by a fine not exceeding one thousand dollars, and by imprisonment at hard labor not more than twenty years. (P.C. 1869, c. 13, s. 11; R.L. 1925, s. 4446; R. L. 1935, s. 6261.)